Fall 9-1-1967

The Selection of Federal Judges

Hugh Scott

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlulr

Part of the Judges Commons

Recommended Citation

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact lawref@wlu.edu.
In approaching the problem of selecting federal judges, we must ask what ends are to be sought from the selection process. The late Chief Justice Arthur T. Vanderbilt of New Jersey stated the goals in this area to be:

"[An] essential of a sound judicial system is, of course, a corps of judges, each of them utterly independent and beholden only to the law and to the Constitution, thoroughly grounded in his knowledge of the law and of human nature including its political manifestations, experienced at the bar in either trial or appellate work and preferably in both, of such a temperament that he can hear both sides of a case before making up his mind, devoted to the law and justice, industrious, and, above all, honest and believed to be honest."\(^1\)

Mr. Justice Miller in *United States v. Lee* appropriately stressed the fact that the power and influence of judges rest to a large degree "on the confidence reposed in the soundness of their decisions and the purity of their motives."\(^2\)

Against this background, I would like to discuss the present method of selecting federal judges and the legislation which I have introduced in the United States Senate to alter and improve this system.

As I believe we must assess our system and possible means of improvement from the vantage point of awareness of the approaches taken by other Nations, I will conclude with an analysis of the judiciary and judicial selection in Great Britain, France, Turkey and Tanzania.

Let it be clear though, there are no wonder formulae in the area of judicial selection. As aptly stated by Robert Leflar in "The Quality of Judges":

"No judge was ever great because he was selected in a certain manner, but the manner of his selection may cause him to be less great than he could have been had he been free of the limitations imposed upon him by the circumstances of his selection.... It is certainly fair to ask, as to any method of

\(^{*}\)United States Senator, Pennsylvania. Member, Senate Judiciary Committee and Improvements in Judicial Machinery Subcommittee. A.B. 1919, Randolph-Macon College; LL.B. 1922, University of Virginia.


\(^{2}\)106 U.S. 196, 223 (1882).
selection that already exists or is proposed: Will it achieve, or at least will it move in the direction of achieving, the designation of judges solely from among those of our number who will really make good judges?"\(^3\)

The present system of selecting federal judges in the United States represents the most prominent example of the appointive system: the President appoints all judges with the "advice and consent" of the Senate.

The Committee on the Federal Judiciary of the American Bar Association serves in an advisory capacity to the President in this process, gathering information on judicial candidates and assessing their qualifications. Though this advisory role is desirable and beneficial, it fails to guarantee continued high quality appointments.

The crux of the matter is found in the 1961 Annual Report of the American Bar Association Committee on the Federal Judiciary:

"Invariably, Presidents have made their judicial appointments primarily from the ranks of their own party…. These facts do not prove that all the appointments made in this way are bad. What they do suggest is that the best qualified judiciary is apt to be sacrificed for political purposes under an appointive scheme."\(^4\)

Statistics bear out the historical relation between the party of the President and the party of the appointee. For example, from the time of President Cleveland to the present, over 92 per cent of those appointed have been from the party of the President.\(^5\)

The Chairman of the Committee on the Federal Judiciary, in referring to President Johnson's appointment of 107 Democrats and 5 Republicans during his Administration stated:

"The Committee sincerely regrets the widening of the already existing and glaring discrepancies in political party affiliation in… the appointments by President Johnson…"\(^6\)

What is wrong with a selection method oriented towards political affiliation? By stressing political affiliation, our present selection process excludes from consideration experienced state judges who have withdrawn from political activity during their term on the bench. More-


over, completely overlooked are those capable and well-qualified people who "suffer the misfortune" of belonging to a party not in control of the Presidency during their most promising years.

Another defect in our system is that the chief litigant in the federal courts, the Department of Justice, plays such an important role in apprising the President of highly qualified persons available to serve on the federal bench.7 No sitting judge desirous of promotion should have to operate under the realization that his chances for elevation depend on the extent to which his actions on the lower court please or displease the chief litigant.

What of the public's concern that factors unrelated to the legal merits may influence a judge's decision when the Justice Department is involved in the case. Whether these factors do or do not come to bear, the system seems to undercut the necessary public confidence in the judiciary. It presents a situation contrary to American notions of fair play, leading some citizens to believe that the cards are stacked against them.

No judge should be forced by the system which selects him to bear the burden of removing public suspicion as to his partisanship. An impartial method of selection offers the best solution.

One of the most serious defects in the present system is succinctly stated by Judge Samuel Rosenman:

"Most of the agitation to change methods of selection comes from a desire to keep out [an unqualified] judge. But it is not enough for a system of judicial selection to aim at exclusions. It should not be designed negatively as a "keep out" system. It should be affirmative and positive—providing a means of bringing to the bench, not haphazardly or occasionally but as consistently and routinely as possible, the very best talent available and willing to serve."8

A continuing permanent body regularly and actively seeking out highly qualified and talented persons for the bench and bringing them to the President's attention is necessary. Such a body is lacking under the present method. Public dissatisfaction with the current method is evidenced by a Gallup Poll9 indicating that nearly two-thirds of those asked approved a suggestion that the American Bar Association be permitted to draw up a list of approved candidates from which the President would select his nominations.

---

Because of the importance of this whole issue of judicial reform and the defects of our present system of judicial selection, I have given considerable thought to this problem. The result is a bill which I introduced on June 30, 1966, in the United States Senate. My

[Note: The text of the Bill is as follows:]

A BILL

To establish a Judicial Service Commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 21 of title 28, United States Code, is amended by adding at the end thereof a new section as follows:

§ 461. Judicial Service Commission

'(a) There is hereby established in the executive branch of the Government an agency to be known as the 'Judicial Service Commission,' hereinafter referred to as the 'Commission.'

'(b) The Commission shall be composed of seven members appointed by the President, by and with the advice and consent of the Senate. Three of the members of the Commission shall be selected from among persons who are members of the bar of the highest court of a State or of a Federal court, three shall be selected from among persons who are not such members, and one shall be selected from among members of the Federal judiciary who have retired from regular active service. Not more than four members shall be from the same political party. One of the members shall be designated as Chairman of the Commission by the President at the time of appointment. Each member of the Commission shall be appointed for a term of three years, except that (1) the terms of the members first appointed shall expire, as designated by the President at the time of their appointments, two at the end of one year, two at the end of two years, and three at the end of three years, following the date of such appointments, and (2) a member appointed to fill a vacancy occurring before the expiration of the term of his predecessor shall serve under such appointment only for the remainder of such term.

'(c) It shall be the duty of the Commission to ascertain the qualifications of prospective appointees to positions as justices or judges of the United States and their availability for appointment to such positions, and, upon the occurrence of a vacancy in any such position, to make recommendations to the President for the filling of such vacancy.

'(d) It is the sense of the Congress that in any case in which the President nominates for appointment as a justice or judge of the United States a person not recommended by the Commission for such appointment, he should transmit to the Senate at the time of such nomination a statement of his reasons for failing to nominate a person recommended by the Commission for such appointment.

'(e) The Commission is authorized to appoint and fix the compensation of such employees, and to make such expenditures, as may be necessary to enable it to perform its functions. With the consent of the head of the department or agency concerned, the Commission may utilize, on a reimbursable basis or otherwise, the services or facilities of any department or agency in the executive branch of the Government.

'(f) Members of the Commission who are not otherwise receiving compensation as officers or employees of the United States shall be entitled to receive compensation at the rate of $ per diem while engaged in carrying out their duties as members, including traveltime. All members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, as authorized
bill would establish a seven-man Judicial Service Commission to be appointed by the President, by and with the advice and consent of the Senate. Three members would be lawyers, three would be laymen from the public at large, and one a retired federal judge. No more than four members could come from the same political party.

The Commission would examine the qualifications and availability of potential appointees to the federal bench. The Commission would make recommendations to the President to fill vacancies in the judiciary as they occur. The bill expresses the sense of Congress to be that whenever the President appoints an individual to the federal judiciary who was not recommended by the Commission, he shall furnish the Senate with a statement explaining why he did not follow the Commission’s advice. Thus, under my plan, although a permanent body is charged with recommending qualified personnel to the President, the final responsibility for selection rests with the Chief Executive.

My bill is based on the principle of the Missouri Plan of nominating candidates, which has long been advocated by the American Judicature Society and the American Bar Association. In a resolution dated August 26, 1958, the Association urged:

“Suggestions for nominations should originate in an independent Commission established as an agency of the President, to advise with the President on appointments, and to receive from outside sources and from all segments of the organized Bar, suggestions of names of persons deemed highly qualified for appointments as judges in their respective jurisdictions.”

This Commission would be composed of persons of “the highest personal integrity, character and objectivity,” chosen by the President to serve at his pleasure, and capable of judging the qualifications of persons for judicial appointment. The Commission’s function would be to screen and to obtain suggestions from any source and to advise the President of its recommendations.

by law for persons in the Government service employed intermittently, while away from their homes or regular places of business.’

Sec. 2. The analysis at the beginning of chapter 21 of title 28, United States Code, is amended by adding the following new item:

’461. Judicial Service Commission.’


Brief submitted for the American Bar Association Through Its Special Com-
While believing most strongly in the principle of selection embodied in the Missouri Plan, I have no irrevocable tie with any specific provision of the bill I have introduced. I therefore welcome the recommendations, comments, assistance, and criticism of the bar, the bench, educators, aspiring law students, interested citizens, and all who strongly desire and would actively work to formulate and install a better plan for selecting men to be federal judges than presently exists. We must forthrightly exercise our duty to ensure that the important functions of the judicial branch of our government are entrusted only to the most qualified members of the bench and bar. There must be no doubt in the minds of the public as to the qualifications and loyalties of the men comprising the federal judiciary.

With the hope of provoking informed discussion of this most important subject, I will conclude this article by outlining the judiciary and judicial selection in Great Britain, France, Turkey and Tanzania. Thus, we will examine briefly the British, European, Near Eastern and African approaches to this problem. These variant systems, and the background leading to their creation, show a vital regard for an impartial judiciary and the difficulties involved in achieving so desirable an end.

---

mittee on Nonpartisan Selection of the Federal Judiciary 7 (1958). This Brief states that the Committee did not contemplate that this Commission would be a statutory one.

At this point, I wish to express my sincere gratitude to Mr. Lewis C. Coffin, Law Librarian and the Legal Specialists in the American-British; European; and Near Eastern and African Law Divisions of the Law Library of the Library of Congress for their valuable assistance.
APPENDIX

GREAT BRITAIN

Introduction

The judicial system in Great Britain, the composition of the present-day courts and the appointment of judges are the result of significant reforms found in the Judicature Acts, 1873-76, and amended in 1925. The Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division, the Lords Justices of Appeal, and the Lords of Appeal in Ordinary are all appointed by the Crown on the recommendation of the Prime Minister. The Judges of the High Court are appointed by the Crown on the recommendation of the Lord Chancellor.

The High Court of Parliament

The House of Lords—Both the House of Lords and the House of Commons constitute the High Court of Parliament. The House of Lords consists of (1) the peers of the realm (the United Kingdom) and (2) the lords spiritual (Archbishops, Bishops of London, Durham, and Winchester, and twenty-one other diocesan Bishops of England). It is the supreme court of appeal in Great Britain and Northern Ireland. To hear appeals at least three of the following persons, designated Lords of Appeal, must be present: the Lord Chancellor of Great Britain, the Lords of Appeal in Ordinary, and any peer of Parliament who holds, or has held, any of the following judicial offices: (1) Lord Chancellor, (2) member of the Judicial Committee of the Privy Council, (3) Lord of Appeal in Ordinary, or (4) judge of the Supreme Court of England or Northern Ireland or of the Court of Session of Scotland.1

As from May 1, 1707 (the date from which the union with Scotland took effect) there has been one Lord Chancellor for Great Britain. He is appointed by the Sovereign delivering the Great Seal of the United Kingdom into his custody and verbally addressing him by

---

that title. Although no special qualifications, other than those required by statute as to religion, are required by law, it is the usual practice for the Sovereign to appoint the person recommended by the Prime Minister from among the Bench or such members of the Bar as hold or have held the office of Attorney-General or Solicitor-General.

The Lords of Appeal in Ordinary are appointed by letters patent. Qualification for appointment is either to have held judicial office for two years, or to have been for fifteen years a practicing barrister in England or Northern Ireland, or a practicing advocate in Scotland. The tenure is during good behavior. The number of Lords is maintained at seven unless the Lord Chancellor, with concurrence from the Treasury, is satisfied that the state of business requires an increase up to nine. A Lord of Appeal in Ordinary is entitled to sit and to vote for all business as a member of the House of Lords during his life.

The House of Commons—The House of Commons consists of members elected as representatives of England, Wales, Scotland, and Northern Ireland. Although the House of Commons, together with the House of Lords, forms the High Court of Parliament, it is not strictly speaking a judicial body. Its jurisdiction is limited to bills of attainder and of pains and penalties, and the obsolete divorce bills. In addition, the House of Commons has jurisdiction over persons for committing any breach of the privileges of the House or of any of its members.

See 3 Blackstone, Commentaries 47 (14th ed.); Campbell, Lives of the Chancellors 21 (1845 ed.) The appointment was formerly made occasionally by patent or writ of privy seal, or by suspending the Great Seal around the neck.

Roman Catholic Relief Act of 1829, 10 & 11 Geo. IV, c.7, § 12, by which nothing in the act is to enable any person, otherwise than as he was on April 13, 1829 by law enabled, to hold the office of Lord Chancellor, i.e. Roman Catholics are not qualified for the office.

Supreme Court of Judicature (Consolidation) Act of 1925, 15 & 16 Geo. V, c.49 § 9, which specified the qualifications of judges of the Supreme Court, makes no allusion to the Lord Chancellor.

This is true in the case of the present Lord High Chancellor, the Rt. Hon. Lord Gardiner. However, neither Lord Haldane, who held the office from 1912 to 1915 and again during 1924, nor Lord Sankey, 1929 to 1935, nor Lord Maugham, 1938 to 1939, nor Lord Simonds, who became Lord Chancellor in 1951, was or had been, a Law Officer of the Crown.


Appellate Jurisdiction Act of 1947, 10 & 11 Geo. VI, c.11, § 1(1) Proviso; there are presently nine Lords of Appeal in Ordinary.
Judicial Committee of the Privy Council

The Judicial Committee is an appellate and a judicial body, although its primary duty is to make a report or recommendation to the Sovereign in Council. As the fountainhead of all justice throughout the dominions, the Sovereign has always exercised jurisdiction through the Council who act in an advisory capacity to the Crown.

The Committee consists of the Lord President of the Council, the Lord Chancellor, ex-Lord Presidents, the Lords of Appeal in Ordinary, and such other members of the Privy Council as shall from time to time hold or have held "high judicial office," and two other privy councillors, who may be appointed by the Sovereign by sign manual.

Initially, membership had been extended to include former chief justices or judges of the Supreme Court of Canada or of a superior court of any province of Canada, or of New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, and New Zealand or any other superior court of Her Majesty's dominions named in that behalf by Order of Council. Subsequently, membership was extended to the chief justice and judges of the High Court of Australia and of the Supreme Court of South Africa.

Supreme Court of Judicature

High Court of Justice—The court is divided into three divisions: Chancery, Queen's Bench, and Probate, Divorce and Admiralty. All jurisdiction vested in the High Court belong to all the divisions alike, and all the judges of the High Court have equal power, authority and jurisdiction.

The judges of the High Court are the Lord Chancellor, the Lord Chief Justice, the President of the Probate, Divorce and Admiralty Division, and the puisne judges (styled "Justices of the High Court")

\[6\] Within the meaning of the Appellate Jurisdiction Act of 1876, 29 & 40 Vict., c.59, § 25 and Appellate Jurisdiction Act of 1887, 50 & 51 Vict., c.70, §§ 3, 5.

\[7\] Judicial Committee Act of 1893, 3 & 4 Will. IV, c.41, § 1; Appellate Jurisdiction Act of 1876, 29 & 40 Vict., c.59, § 6; Appellate Jurisdiction Act of 1887, 50 & 51 Vict., c.70, § 3.

\[8\] Judicial Committee Amendment Act of 1895, 58 & 59 Vict., c.44, § 1(1), Schedule; Appellate Jurisdiction Act of 1913, 3 & 4 Geo. V, c.21, § 3(4), sched.

\[9\] Appellate Jurisdiction Act of 1908, 8 Edw. VII, c.91, § 3(1).

\[10\] Appellate Jurisdiction Act of 1913, 3 & 4 Geo. V, c.21, § 3(2).

of the several divisions. A person who is qualified for appointment as a Lord Justice of Appeal (see below) or who is a judge of the Court of Appeal, is qualified for appointment as Lord Chief Justice, Master of the Rolls, or President of the Probate Division. The Lord Chancellor, as head of the judicial administration, is responsible for the appointment of the puisne judges of the High Court. The responsibility for selection for appointment of the Lord Chief Justice and the President of the Probate, Divorce and Admiralty Division rests with the Prime Minister. The appointment of judges is by the Crown by letters patent.

The qualification for a puisne judge of the High Court is to be a barrister of not less than ten years' standing. All judges hold their offices during good behavior, and are removable only on an address to the Crown by both Houses of Parliament. No judge of the High Court is capable of being elected to or of sitting in the House of Commons. The office of a judge of the High Court may be vacated either by resignation in writing under his hand addressed to the Lord Chancellor without any deed of surrender, or by his being appointed a judge of the Court of Appeal.

The Court of Appeal—At present, the Court of Appeal consists of the Lord Chancellor, who is the president of the Court, ex-Lord Chancellors, any Lord of Appeal in Ordinary who, at his appointment, would have been qualified to be appointed an ordinary judge of the Court of Appeal, or who, at that date, was judge of that Court, the Lord Chief Justice, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division and eight ordinary members called Lord Justices of Appeal. All are ex-officio judges, although, in practice, the Master of the Rolls is the president of the Court. The Lord Chancellor may appoint one of the Lords Justices to be

---

14Supreme Court of Judicature (Consolidation) Act of 1925, 15 & 16 Geo. V, c.49, § 9(9).  
15Supreme Court of Judicature (Consolidation) Act of 1925, 15 & 16 Geo. V, c.49 § 11(1); under the proviso of this section, except when the number of puisne judges of the High Court is less than twenty-five, a vacancy is not to be filled unless the Lord Chancellor with the concurrence of the Treasury is satisfied that the state of the business requires that the vacancy should be filled. See also; Supreme Court of Judicature (Amendment) Act of 1944, 7 & 8 Geo. VI, c.9, § 1(2)(a), sched.  
16Ibid., § 12(1).  
17Ibid., § 10(1) (2).  
18Ibid., § 6; Supreme Court of Judicature (Amendment) Act of 1938, 1 & 2 Geo. VI, c.67, § 1.  
19P. S. JAMES, INTRODUCTION TO ENGLISH LAW 47 (Butterworths 1966).
Vice-President, to preside when sitting and acting in any division of the Court of Appeal if no ex-officio judge is sitting. Appointed by letters patent of the Crown, the Lords Justices of Appeal are required to be barristers of fifteen years' standing or to have been judges of the High Court.

**Courts of Criminal Jurisdiction**

*Court of Criminal Appeal*—The Lord Chief Justice of England and all the judges of the Queen's Bench Division (see above) are the judges of the Court of Criminal Appeal. As duly constituted, the Court consists of an uneven number of judges and never less than three. In the absence of the Lord Chief Justice, the next senior judge presides.

*Central Criminal Court*—Constituted in 1834, the Court took the place of the former sessions at the Old Bailey which had been held from very early times under special commissioners of gaol delivery for Newgate and of oyer and terminer for the city of London and county of Middlesex. It is a branch of the High Court of Justice.

Persons named in the commission are the Lord Mayor of London, the Lord Chancellor, all judges of the High Court, the Dean of the Archer, the aldermen of London, the Recorder, the Common Serjeant, the judges of the Mayor's and City of London Court, and any person who has been Lord Chancellor, or a High Court judge together with such others as the Crown shall name. In practice, the Recorder and Common Serjeant and the additional judge of the Mayor's and City of London Court act as regular judges of the Court.

**Magistrates Courts**

The Magistrates Courts consist of justices of the peace acting under an enactment or by virtue of their commissions or under common law or of a stipendiary magistrate. They are inferior courts with...
both civil and criminal jurisdiction, and for some purposes, they are courts of record.

Justices of the peace for a county are assigned to the commission of the peace on the authority of the Lord Chancellor, who normally acts on the advice of an advisory committee he has appointed. The committee is advisory only; final responsibility rests with the Lord Chancellor. No one is disqualified for the office of justice of the peace because of profession or sex.

* * * *

FRANCE

The main feature of the legal system in France is the coexistence of two distinct sets of courts, one for the administration of law in cases between private persons, and the other for disputes in which one party is the public authority. The Court of Cassation and the Council of State are the top organs for these two systems, respectively. The power to adjudicate conflicts between two jurisdictions is conferred on the Tribunal of Conflicts.

The French Constitution of October 4, 1958, contains the following provisions on judicial authority:

Art. 64. The President of the Republic is the protector of the independence of judicial authority. He is assisted by the Superior Council of the Judiciary.

An organic law regulates the position of the Judiciary. Judges are irremovable.

Art. 65. The Superior Council of the Judiciary is presided over by the President of the Republic. The Minister of Justice is ex officio its Vice-President. He may deputize for the President of the Republic.

The Superior Council has, in addition, nine members appointed by the President of the Republic under the conditions laid down by an organic law.

The Superior Council of the Judiciary submits recommendations for the appointment of judges to the Court of Cassation and to the posts of first Presidents of the Appeals Courts. It gives its opinion under the conditions laid down by the organic law, on the proposals of the Minister of Justice, concerning the

---

1. Magistrates Act of 1858, 21 & 22 Vict., c.73, § 1; Magistrates Courts Act of 1952, 15 & 16 Geo. VI and 1 Eliz. II, c.55, § 121.
appointment of the other judges. It is consulted on reprieves under the conditions laid down by an organic law.

The Superior Council of the Judiciary sits as the Disciplinary Council for judges. It is then presided over by the first President of the Court of Cassation.\footnote{Constitution. Paris, Journaux officiels, 1962, No. 1119, 19-20.}


The members of the judiciary (magistrature) are members of the career profession and are recruited from among young law graduates, by means of a special examination, after they receive training in a special school established in 1958 under the name of the centre nationale d'études judiciaires (Ordinance of December 22, 1958).

This school is a post-entry civil service training school modelled on the Ecole Nationale d'Administration. Entrance is by a competitive examination open to law graduates, and students follow a three-year course. In the first year they are attached to some part of the judiciary and gain practical knowledge. The second year is spent at the school itself in academic studies. At the end of the second year there is an examination on the basis of which the students' future careers are determined. The third year then trains them for the type of court to which they will subsequently be posted. Students become civil servants and receive a salary as soon as they enter the school: it was thought that this would raise the standard of recruitment—many potential candidates having been deterred in the past because they could not afford to remain without income during the two years of the barrister's training period.\footnote{F. RIDLEY & J. BLONDEL, PUBLIC ADMINISTRATION IN FRANCE, 135-36 (Routledge & Kegan Paul, 1964).}

Candidates for the training school must meet the following conditions: 1) be law school graduates; 2) have been French nationals for at least five years; 3) enjoy civil rights and be of good moral character; 4) be in a regular position in regard to the laws on recruitment for the armed forces; 5) meet the physical conditions necessary for the performance of their functions and be uninjured or recovered from any sickness which would entitle them to prolonged leave. (Art. 16 of Ordinance No. 1270 of Dec. 22, 1958).
The candidates admitted by the competitive examinations are appointed by the order of the Minister of Justice as judicial auditors. In addition the following may be appointed as judicial auditors, on the proposal of the special commission, with or without examinations:

1) doctors of law who, in addition to the diplomas required for a doctor's degree, have some other diploma of higher studies or who have been assistants in the State law schools for two years;

2) doctors of law who prove that they have been admitted to the Bar (Ordre) in one of the jurisdictions in the Republic or in one State of the [French] Community for at least three years;

3) doctors of law who prove that they have practiced as lawyers at the State Council and at the Court of Cassation, solicitors (avoués), notaries public or court clerks in charge for at least three years.

Public officials, graduates of law school, whose competence and activities in legal, economic or social fields qualify them for the performance of judicial functions may also be appointed as judicial auditors under the same conditions. (Art. 22). Their studies in the training school are reduced by one third.

The capacity of the auditors to fulfill judicial functions, after their training in the center, is attested to by their inscription on the classification list according to their rating by a jury. This list is submitted to the Minister of Justice, who has it published in the Journal officiel. The jury may reserve an auditor for judicial functions or prescribe that he continue training for one more year.

The judicial corps consists of two grades. Steps of seniority are established within each grade. The President of the Republic appoints auditors of justice to the second grade of the judicial hierarchy on the proposal of the Minister of Justice. In addition, within each grade one vacancy out of ten may be filled by persons who are not auditors of justice under the following conditions:

In addition to the former magistrates of the judicial order, there may be appointed to the first or second grade of the judicial hierarchy directly [the following persons] who meet the requirements established in Article 16:

1. Public officers whose competence and activities in the legal, economic or social fields qualify them for the performance of judicial functions and who have been in service for more than eight years. The list of these categories will be established by a public administration regulation.

2. Professors (agregés) of law schools and deputy lecturers
Selection of Federal Judges

(chargés des cours) who have had at least two years' teaching experience in the State Law School;

3. Lawyers, counsels for the defense (avocats defenseurs), lawyers at the Council of State and the Court of Cassation, solicitors (avoués), notaries public, titular court clerks (greffiers titulaires en charges), chief clerk of the Court of Cassation, court clerks of the chambers of the said Court who have had at least two years of service in their profession in the jurisdiction of the Republic or States of the Community;

4. Lawyers, counsels for the defense, notaries public who have practiced their profession for at least ten years in the jurisdiction of the State in the territories of which these professions are open to the nationals of the Community;

5. Central administration attachés of the Ministry of Justice and attachés of justice who have had at least fifteen years of service in this capacity. (Art. 30 of the Ordinance of Dec. 22, 1958)

The above-mentioned persons, however, may be appointed according to Article 31 of Ordinance No. 58-1270 of December 22, 1958, only upon the advice of the Commission for Promotions.

A certain number of high magistrates specified in Article 3 of the above-mentioned Ordinance, as amended on August 6, 1963, are placed outside of the judicial hierarchy, namely:

The judges of the Court of Cassation, the first presidents of the appeal courts and the prosecutors (procureurs généraux) of the said courts, the presidents of the chambers of the Court of Appeal and the assistants of the attorneys general (avocats généraux) at these courts, the president and the first vice-president at the Tribunal of the Seine, the head of the prosecution department (procureur de la République) and his assistants at this court.

The appointment of the judges outside of the judicial hierarchy is subject to special rules established in Articles 37 to 41 of the Ordinance of 1958. The judges of the bench (magistrats du siège) are appointed by the President of the Republic under conditions laid down by Article 65 of the Constitution. This Article prescribes that "The Superior Council of the Judiciary submit recommendations for the appointment of judges to the Court of Cassation and to the posts of first Presidents of the Appeal Courts."

In addition, the following persons who do not belong to the judicial corps may be appointed to posts outside of the hierarchy:

1) Councilors of State in ordinary service; 2) directors of the Ministry of Justice and the Director of the National Center for Judiciary Education, or former magistrates; however, to
be appointed to the Court of Cassation they must prove that they have five years of seniority in service as directors; 3) maîtres de requêtes of the State Council having at least ten years of service in this capacity; 4) professors of the law schools of the State universities having at least ten years of teaching experience as professors or assistant professors (agrégés); lawyers at the State Council and the Court of Cassation, members or former members of the Council of the Bar (Orde) having at least twenty years of professional practice.

The candidates listed in categories 3, 4 and 5 may be appointed to functions outside of the hierarchy only upon the advice of the commission of promotion. (Art. 40 of the Ordinance of Dec. 22, 1958)

Until the reform of 1953 the Council of State was judge of the first and last instance in administrative matters, while the prefectural councils were only courts of the first instance in specific cases. By Decree No. 59-934 of September 30, 1953, prefectural councils were transformed into administrative courts (tribunaux administratifs). The status of administrative court judges was defined by Decree No. 63-1963 of December 30, 1963.

The auditors of the administrative courts are recruited from among the graduates of the National School of Administration:

This institution was set up by the French Government in October 1945 as an administrative laboratory, as it were, to prepare those destined for careers at the upper level of the French administration. Admission to the School is by annual competitive examination. There are two type of examinations. The first is open to university graduates of less than twenty-six years; the second is intended for those who have already had at least four years of service in the administration and are between twenty-four and thirty years of age... The course of study, of three years' duration, includes practical training in various administrative agencies as well as the more normal type of academic study. While at the School, students are in effect in the position of civil servants, and they receive a fixed salary from the State.6

The members (councilors) of the administrative tribunals are appointed by a decree on the proposal of the Minister of the Interior, countersigned by the Minister of Justice.

In addition, the councilors may be recruited from among government employees according to the following scheme established by Article 9 of Decree No. 63-1386 of December 30, 1963:

---

Art. 9. The councilors of the second class of the administrative tribunal are recruited from among former students of the National Administrative School for five vacancies out of six.

They are also recruited from among government employees according to the following cycles:

First cycle:
When five appointments are made by the application of the provisions of the first paragraph of the present Article, one councilor of the administrative tribunal is appointed from among the magistrates of the judicial order, candidates admitted to the fellowship (agrégation) of public law, and the principal attachés of the prefecture, law graduates, who prove that they have had ten years of effective service in their corps.

Second cycle:
When five new appointments are made to the corps of councilors of the administrative tribunal by the application of the provisions of the first paragraph of the present Article, one councilor of the administrative tribunal is appointed from among the magistrates of the judicial order, candidates admitted to the fellowship of public law, and government employees, law graduates belonging to the corps classified Category A, specified in Article 17 of the above-mentioned Ordinance of February 4, 1959, who prove that they have had ten years of service in this capacity.

The candidates are subject to the opinion given by a special commission, presided over by a Councilor of State, the chief of the permanent inspection of administrative jurisdictions, and two representatives of the Minister of the Interior and one representative of the Guardian of the Seal, the Minister of Justice, and by the President of the Administrative Tribunal of Paris.

The Council of State (supreme administrative court) consists of three types of members: the councilors of State, maîtres des requêtes, and auditors. Since 1946 the auditors have been chosen from among the graduates of the School of Administration. Auditors of the second class are subject to a probationary period of two years. Appointments of the second class are made in order of seniority as vacancies occur by a decree of the Vice-President of the State Council on the proposal of the president of a section.

Maîtres des requêtes are recruited from among the auditors of the first class in order of seniority. However, every fourth appointee, according to established rule, must be chosen from among outsiders,

who must have had at least ten years of public service. In such a way the possibility of appointing persons who have distinguished themselves in the public service is created.

Councilors of state are chosen from among the maîtres des requêtes in order of seniority. However, one out of every three appointees must be an outsider.

The member of the administrative courts and the Council of State do not enjoy the status of irremovability. They belong to the Civil Service. However, as B. Schwartz stated:

The right to remove members of the Council has not been exercised for nearly a century, and its exercise today would be almost unthinkable.8

* * * * *

TURKEY

In the highly complex Turkish system of judicial selection, judges, for the most part, are selected by other judges, by courts and by legislative bodies, while only two are appointed by the President of the Republic. No judges are selected by the elective process.

Law No. 2556 of July 14, 1934,2 regulates the required qualifications for judgeships, the selection and appointment of judges and all matters relating to the judicial profession. According to this law, no person may become a judge or a public prosecutor without first serving an apprenticeship for a term of two years in the courts (this period of time is only one year for law graduates who have obtained their doctorate degrees) and proving his competence in compliance with the conditions stated in the above mentioned law.

A person can be nominated for apprenticeship if he is a Turkish citizen between the ages of 21 and 40; if he has performed his military service or has been excused by reason of unsuitability; if he has no contagious disease or mental or physical infirmity which would render him incapable of performing his duties properly; if he has no defaults in his moral conduct; if he is not married to a foreigner (anyone marrying a foreigner during the training period shall be automatically discharged); and if he is a graduate of one of the law schools or the School of Political Science of Ankara. If the applicant is a graduate of the School of Political Science or a foreign law school, he must be examined by a Turkish law school official in those courses not taken by him but required in the Turkish law school curriculum.

8Schwartz, op. cit. at 32.
2Published in T. C. Resmi (Turkish official gazette) No. 2751 of July 14, 1934.
At the end of the probationary term, the apprentices shall be nominated to become assistant judges or assistant general prosecutors by the Council of Selection which consists of the Chief Public Prosecutor, four members of the Court of Cassation, the Chief of the Board of Inspection, and the Chiefs of General Directorate of Civil and Criminal Affairs. The Council convenes under the chairmanship of the First President of the Court of Cassation. The Council of Selection determines also, pursuant to the Law on Judges, whether the assistant judges or the judges and the general prosecutors are eligible for promotion. Such determination is based on their moral conduct, their professional knowledge and capacity, their zeal, their work productivity, their legal opinions, etc. After the Council of Selection has determined the persons who are eligible for promotion, it indicates in front of the name whether he has greater ability as a judge or as a public prosecutor.

Professors who have been teaching law courses in a law school may be appointed directly to membership in the Court of Cassation and associate professors may be appointed to positions of judges or public prosecutors.

The Court of Cassation is the single appellate court in Turkey. Its members are elected by the High Council of Judges. The Chairman, Vice-Chairman and the Chief Prosecutor are elected by the plenary session of the Court of Cassation by an absolute majority on a secret ballot.²

The High Council of Judges consists of eighteen regular and five alternate members. Six of these members are elected by the General Assembly of the Court of Cassation and six by judges of the first rank from among themselves by secret ballot. The National Assembly (Turkey's lower house) and the Senate each elects three members by secret ballot and by a vote of absolute majority of its plenary session from among individuals who have served as judges in the higher courts or qualified for membership in such courts. Two of the alternate members are elected by the Court of Cassation, and three members are elected by the judges of the first rank, the National Assembly and the Senate. The High Council of Judges elects its Chairman from among its own members by a vote of absolute majority of its plenary session. The term of office of members of the High Council of Judges is four years, and the election of half of them shall be renewed every

two years. Members elected while serving as judges may not be re-elected twice in succession.³

The Chairman, members and the Chief Attorney of the Council of State, the Court having jurisdiction on administrative disputes and suits, are elected by the Constitutional Court⁴ among individuals meeting the qualifications prescribed in the Law on Organization of the Council of State.⁵

The Constitutional Court, whose main task is to review the constitutionality of laws and by-laws enacted by the Turkish General National Assembly (composed of the National Assembly and the Senate) consists of fifteen regular and five alternate members. Four regular members are elected by the Court of Cassation, three by the General Assembly of the Council of State, one member elected by the Audit Court, three members elected by the National Assembly, two members elected by the Senate, and the other two members of the Constitutional Court are appointed by the President of the Republic. The Court of Cassation elects two alternates, the Council of State elects one, and each legislative body selects one alternate respectively to the Constitutional Court.⁶

* * * * *

TANZANIA¹

The United Republic of Tanzania is an independent African nation composed of the former British colonies of Tanganyika and Zanzibar.² Its judicial and court systems are, therefore, patterned after the British although these systems have assimilated certain traditional African elements. In fact, Tanzania alone among former British African countries has completely integrated its English and

---

²Ibid, Article 143.
³Ibid, Article 140.
⁵Constitution, note 2 supra, Art. 145.
⁶Tanzania has been selected as the one country in Africa for a brief survey of its system of judicial appointments due to its relative importance on that continent and because it has been a stable, yet, on the whole a progressive nation.
⁷Tanganyika gained its independence on December 9, 1961, and Zanzibar on December 9, 1963. They merged officially on April 26, 1964. The judicial system considered in this report will be that of Tanganyika, which is provided for by the Constitution and Acts of Tanzania. The courts and judiciary of Zanzibar are for the most part exempted by the Tanzanian Constitution from regulation by the Tanzania central government and operate independently thereof.
customary court systems so there is now only one hierarchy of courts.\(^3\)

The authority to appoint all judges and, in fact, all judicial officers is vested in the President of Tanzania by its Constitution.\(^4\)

The President, however, has delegated to the Judicial Service Commission,\(^5\) which in turn has delegated to the Chief Justice of the High Court, authority to select subordinate court judges and officers,\(^6\) retaining for himself the appointment of High Court judges.

The Chief Justice of the High Court is selected directly by the President while the puisne judges (comparable to associate judges in this country) and associate judges\(^7\) of that court are appointed by the President after consultation with the Chief Justice.\(^8\) The High Court in Tanzania is tantamount to the Supreme Court of the United States\(^9\) with the important exceptions that certain non-constitutional cases may be appealed from that court to the Court of Appeal for


\(^8\)CONST., § 57, at 27, note 4, supra. Section 57 also provides that “a person shall not be qualified for appointment as a judge of the High Court unless: (i) he is, or has been, a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth that may be prescribed by Act of Parliament, or a court having jurisdiction in appeals from any such court; or (a) he holds one of the specified qualifications for a total period of not less than five years.”

\(^9\)CONST., note 4, supra, § 64, at 30-31.
Eastern Africa\textsuperscript{10} and it is empowered to entertain original jurisdiction over all criminal and civil cases.\textsuperscript{11}

Subordinate court judges are to be selected by the Chief Justice of the High Court from among members of the newly created judicial service under his delegated authority from the Judicial Service Commission. The judicial service functions in a fashion similar to that of most civil services: career men begin at the bottom in remote, lesser posts eventually working their way up to higher positions, presumably on the basis of individual merit.\textsuperscript{12} While the Chief Justice is required by regulation to give consideration to members of the judicial service,\textsuperscript{13} the present shortage of qualified members necessitates the selection of some outside lawyers.\textsuperscript{14}

Throughout this whole appointment process, the President retains his prerogative to appoint whomever he wishes, despite any delegation of authority to the Judicial Service Commission or Chief Justice.\textsuperscript{15} Also, while the Commission is required to furnish advice upon request by the President, such reference to the Commission does not preclude his seeking advice elsewhere.\textsuperscript{16}

\textsuperscript{11}A. N. ALLOTT, \textit{JUDICIAL AND LEGAL SYSTEMS IN AFRICA}. 98. (Butterworth, 1962).
\textsuperscript{12}McAuslan, 549-550, note 3, \textit{supra}.
\textsuperscript{13}The Judicial Service Regulations, 1961, \textit{op. cit.}, § 22, at 359, note 6, \textit{supra}.
\textsuperscript{14}McAuslan, 550, note 3, \textit{supra}.
\textsuperscript{15}Constituent Assembly Act No. 10 of 1962, § 15 (4), at 6, note 5, \textit{supra}.
\textsuperscript{16}\textit{Ibid.}, § 16, at 6.